

UNITED STATES OF AMERICA
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

Do. 05-10006-JLT

V.

DAVID TORRES

MOTION TO STRIKE SURPLUSAGE IN INDICTMENT

Now comes the defendant, David Torres, and moves, pursuant to Rule 7(d), Federal Rules of Criminal Procedure that the Court strike the surplusage in the indictment; to wit; the following language:

NOTICE OF ADDITIONAL FACTORS

The Grand Jury further charges that:

1. The conduct that is the subjects of Counts One, Two and Three, and other relevant conduct, involved more than two threats, as described in U.S.S.G. § 2A6.1(b)(2).

In support thereof , the defendant states that these statements are sentencing factors and not necessary to describe a necessary element of the offense. Rule 7 (c) (1) of the Federal Rules of Criminal Procedure requires that the “indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged “. The above language does not provide notice to the defendant of the elements of the crime, but rather seeks to provide sentencing enhancements as matters that must be proven to a jury. This is no longer necessary after the decision in United

States v. Booker, 125 S. Ct. 738 (2005). “In Booker, the Court held that those portions of the Sentencing Reform Act of 1984 that make the United States Sentencing Guidelines mandatory, or that depend upon the Guidelines' mandatory nature, are constitutionally infirm and must be severed and excised from the Act. Because Booker held the Sentencing Guidelines are not mandatory, but advisory only, if none of the facts contained in the Sentencing Allegations portion of the Indictment must be proven to a jury in order for this Court to consider them at sentencing, the allegations are surplusage and should be stricken.” United States v. Cormier, 226 F.R.D. 23, 25 (D.Me. 2005).

The Government assents to this motion.

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